comment on the statement. It would therefore appear that he did not direct his mind on the statement when he came to consider the case. I would venture to suggest the following procedure which should be adopted when dealing with such statements. The Court should bear in mind the provisos to section 15(1) of the Act. The Court should only admit the statement when it is satisfied that the provisions of section 15(1) have been complied with. Once the statement is admitted the Court must accept the contents of such statement. In this case apart from the statement there appears to be some corroboration from two witnesses who were passengers in respondent's van.

There is another matter which I would like to comment. There is nothing in the record to show that the consent of the Public Prosecutor under section 26(1) of the Act has been obtained. The learned Deputy Public Prosecutor who appeared for the appellant stated from the Bar that the sanction was produced at the trial but was not marked and admitted by the Court. The sanction was shown to me. I followed the ruling in *Lyn Hong Yap* v. *Public Prosecutor*[1] in which it was held that the consent of the Public Prosecutor was not defective and that the trial of the appellant in that case was not a nullity. I would suggest that before hearing a case under the Act the Court should first see that the provisions of section 26 of the Act have been complied with thereby avoiding all the difficulties which may arise from such an omission.

For the above reasons I allow the appeal and reverse the order of the learned President. I convict the respondent on the charge preferred against him and sentence him to a fine of $100 in default one month imprisonment.

Appeal allowed.

PUBLIC PROSECUTOR v. TAN KIM KANG & ORS.

[A. Cr. J. (Hashim J.) September 16, 1962]

[Kuala Trengganu — Criminal Appeal No. 8 of 1962]

Criminal Law and Procedure — Charge — Alteration of — Criminal Procedure Code (Cap. 6), ss.158 and 173(h), (i) and (j) — Powers of Court under s.158.

Criminal Law and Procedure — Preliminary inquiry — Duty of Magistrate — Criminal Procedure Code (Cap. 6), ss.141 and 142 — When to transmit depositions to Public Prosecutor — Criminal Procedure Code, s.140(iv).

Section 158 of the Criminal Procedure Code (Cap. 6) empowers a court to "alter or add to any charge at any time before judgment is pronounced." It is permissible under that section to alter the charge after the defence has been called but it is a course which should be adopted only with great caution. A safer and better course would be to follow the provisions of section 173(h), (i) and (j) of the Code. It is clear from these three subsections that a President or a Magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution.

Section 141 of the Criminal Procedure Code (Cap. 6) read together with section 142 would mean that all a Magistrate at a preliminary inquiry has to do is to see whether there is any evidence of any offence which is triable in the High Court and if there is he is in duty bound to commit the accused person for trial. It is not his duty to weigh the evidence as if he was trying the case. His duty is either to commit the accused for trial or to discharge him. If he thinks there are peculiar difficulties or circumstances connected with the case he should transmit the depositions to the Public Prosecutor under section 140(iv) of the Code.

CRIMINAL APPEAL.

Syed Hamzah bin Tahir (Deputy Public Prosecutor) for the appellant.

Maidin bin Mohamed Ibrahim (Pleader) for the respondents.

Cur. Adv. Vult.

Hashim J.: This should have been a simple and straightforward case if it had not been for the vacillations of the prosecution and the peculiar way it was handled by the Court. The 4 respondents were originally charged under section 458 of the Penal Code on December 26, 1961 in the Magistrate's Court at Kuala Trengganu. Instead of fixing a date for the Preliminary Inquiry the Magistrate recorded their pleas. They all claimed trial to the charge. In the first place the Magistrate had no jurisdiction to hear the case. In the second place there was no application by the prosecution under section 63(2)(a) of the Courts Ordinance, 1948 to have the case tried in the Sessions Court. Then on January 30, 1962 the prosecution amended the charge in respect of respondent No. 1 by deleting the word "jointly" in the original charge. The charge against the 3 other respondents was amended to bring in the allegation of common intention. The charge against No. 1 read together with the charge against the other 3 respondents would not appear to make sense. The case was transferred to the Sessions Court because the Prosecuting Officer intimated that there was a possibility the case would be heard in the Sessions Court. To my mind this transfer of the case to the Sessions Court was most irregular and improper. Unless and until the application under section 63(2)(a) of the Courts Ordinance was made the case should have remained in the Magistrate's Court. Then on April 1, 1962 when the case came up in the Sessions Court the prosecution again amended the two charges by tendering one charge in which the 4 respondents were charged under section 459 of the Penal Code. The case was again transferred back to the Magistrate's Court. The preliminary inquiry commenced on April 1, 1962. After the Magistrate had recorded the depositions of the prosecution witnesses he came to a finding that there were not sufficient grounds to commit the 4 respondents for trial under section 459 of the Penal Code and he proceeded to hear the case as a summary trial under section 140(i)(a) of the Criminal Procedure Code (Cap. 6). He first transferred the case again to the Sessions Court and heard it as President, Sessions Court. He framed 2 charges against respondent No. 1, firstly under section 457 of the Penal

Code and secondly, under section 325 of the same Code. He framed a charge under section 457 of the Penal Code read together with section 34 of the same Code against the 3 other respondents. He proceeded to call for the defence and eventually he found 1st respondent not guilty on the first charge (section 457). He reduced the 2nd charge (section 325) to section 335 of the Penal Code and totally disregarding the provisions of section 159 of the Criminal Procedure Code found him guilty on the amended charge, convicted him and sentenced him to a fine of $500 in default 5 months' imprisonment. As regards the other 3 respondents he found them not guilty on the charge framed by him and acquitted and discharged them. The Public Prosecutor appealed against his order in respect of the 4 respondents.

In my opinion the conviction in respect of the first respondent under section 335 of the Penal Code is an illegality and not an irregularity which can be cured under section 422 of the Criminal Procedure Code. Section 159 of the Criminal Procedure Code makes it mandatory on the part of the Court to call upon the accused to plead to the altered charge. This was not done in this case.

I would like to comment on the powers of the Court under section 158 of the Criminal Procedure Code. Section 158 of the Criminal Procedure Code empowers a Court to "alter or add to any charge at any time before judgment is pronounced". It is permissible under that section to alter the charge after the defence has been called but it is a course which should be adopted only with great caution. I think a safer and better course would be to follow the provisions of section 173(h), (i) and (j) of the Criminal Procedure Code. It is quite clear from these 3 sub-sections that a President or a Magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution.

The depositions of the prosecution witnesses at the preliminary inquiry show evidence of housebreaking and causing grievous hurt. Even the President who presided at the preliminary inquiry as a Magistrate came to this finding when he framed the charge against 1st respondent under section 457 of the Penal Code. Unfortunately the President appeared to confuse section 457 with section 459 of the Penal Code. He framed the charge substantially in terms of section 459 of the Penal Code but inserted section 457 instead of section 459 as the punishable section. Section 141 of the Criminal Procedure Code read together with section 142, in my opinion, would simply mean that all a Magistrate at a preliminary inquiry has to do is to see whether there is any evidence of any offence which is triable in the High Court and if there is he is in duty bound to commit the accused person for trial. It is not his duty to weigh the evidence as if he was trying the case. His duty is either to commit the accused for trial or to discharge him. If he thinks there are peculiar difficulties or circumstances connected with the case he should transmit the depositions to the Public Prosecutor under section 140(iv) of the Criminal Procedure Code. In this case there is some evidence of housebreaking. Deponent No. 1 stated he saw the 4 respondents entering the shop. Deponent No. 1 went on to say that no one could open the door from the outside without breaking the latch. Deponent No. 4, a police constable, stated that he saw the door of the shop had been broken. He explained that the hinges to the door had come off. The medical evidence was that there was a fracture of the 3rd phalanx of the index finger of the right hand of Ng Nga Chang, fracture of the ulna bone of Lim Ah Mui and linear fracture lower ¼" of the right ulna of Tan Kim Kang.

On the above grounds I allow the appeal, reverse the order of the President and direct that the 4 respondents be committed for trial under section 459 of the Penal Code.

Appeal allowed.

Pleader: *Maidin bin Mohamed Ibrahim.*

Re KARUPPIAH

[O. Bk. J. (Gill J.) September 18, 1962]

[K.L. — In Bankruptcy No. 8 of 1961]

Bankruptcy — Landlord and tenant — Bankruptcy of tenant — Disclaimer of lease by Official Assignee — Notice under Bankruptcy Rules, 1921, r.259 — Whether landlord entitled to possession — Bankruptcy Ordinance, 1959, s.59(6) — Whether bankrupt's wife and children have equitable interest.

Landlord and tenant — Bankruptcy of tenant — Disclaimer of lease by Official Assignee.

The Official Assignee having served notices under Bankruptcy Rules, 1921, r.259, on the landlord disclaiming the lease in respect of premises occupied by the bankrupt, the landlord in this application sought to recover vacant possession thereof. On behalf of the bankrupt it was urged that (1) leave of the court was necessary to disclaim the lease; (2) rule 259 had no application as the 1921 Bankruptcy Rules were not rules made under the Bankruptcy Ordinance, 1959; (3) the landlord was not entitled to possession on this application in these proceedings but he should bring a separate action; and (4) the premises here was the matrimonial home of the bankrupt and his wife, and children and consequently the wife had an equitable interest in the tenancy.

Held: (1) the disclaimer of the lease in this case by the Official Assignee by notices issued under rule 259 of the Bankruptcy Rules, 1921, was a proper disclaimer in law as under the ordinary rules of interpretation the old Bankruptcy Rules remain in force until new rules are made under the new Ordinance;

(2) on his bankruptcy the rights of the bankrupt under the contract of tenancy passed to the Official Assignee and the bankrupt became a licensee of the Official Assignee, which licence was terminated by the disclaimer and whereupon the bankrupt became a trespasser. The court has jurisdiction to make an order under section 59(6) of the Bankruptcy Ordinance for delivery of possession of premises which have been disclaimed by the Official Assignee;

(3) the right of the bankrupt's wife and children to remain on the premises flows from and is tied up with the bankrupt's right to remain on the premises.